

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

Number: **201041033**  
Release Date: 10/15/2010  
Index Number: 851.02-00

Person To Contact:  
ID

Telephone Number:

Refer Reply To:  
CC:FIP:B02  
PLR-147758-09  
Date:

June 30, 2010

### Legend:

Parent =

Fund 1 =

Fund 2 =

Fund 3 =

Fund 4 =

Trust 1 =

Trust 2 =

Sub =

Foreign Country =

State =

Dear \_\_\_\_\_ :

This is in response to a letter dated August 25, 2009, requesting a ruling that income earned by Funds 1, 2, 3, and 4 from investments in a subsidiary that qualifies as a controlled foreign corporation ("CFC") constitutes qualifying income under section 851(b)(2) of the Internal Revenue Code.

### FACTS

Fund 1, which has not yet been legally formed, will be organized as a series fund of Trust 1, a statutory trust formed under the laws of State. Funds 2, 3, and 4 are already organized as series funds of Trust 2, another statutory trust that is also formed under the laws of State.

Trusts 1 and 2 are registered as investment companies under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq. ("the 1940 Act").

Fund 1 will elect, and Funds 2, 3, and 4 have elected, to be regulated investment companies ("RICs") under section 851 of the Code.

Sub is a public limited company incorporated under the law of Foreign Country. It is an umbrella fund with segregated liability between its sub-funds. It is represented that Sub is treated as a corporation under section 301.7701-2(b)(8) of the Procedure and Administration Regulations.

Fund 1 will own a class of Sub stock represented by assets to be invested in commodity-related investments that will comprise a sub-fund ("Sub-fund 1") of Sub. Funds 2, 3, and 4 will own a class of Sub stock represented by assets to be invested according to certain investment strategies ("Sub-fund 2").

Parent represents that although Sub-fund 1 and Sub-fund 2 will not be registered as investment companies under the 1940 Act, they will comply with the requirements of section 18(f) of the 1940 Act, Investment Company Act Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to transactions in commodity index swap agreements and other transactions in derivatives.

Funds 1, 2, 3, and 4 ("Funds") will invest a portion of their assets in Sub, subject to the limitations set forth in section 851(b)(3) of the Code.

Parent owns one hundred percent of Sub. A portion of Parent's Sub shares will be redeemed contemporaneously with the initial investments of Funds in Sub. On the

last day of the first tax year in which any of the Funds owns Sub shares the Funds and Parent will collectively own more than fifty percent of Sub's shares, and each of the Funds and Parent will own ten percent or more of Sub's shares. In subsequent taxable years, however, more than fifty percent of Sub's shares may be owned by persons other than Parent and the Funds.

It is expected that all of Sub's income will be "Subpart F" income and passive income for purposes of section 1297 of the Code.

#### LAW

Section 851(b)(2) of the Code provides that a corporation is not considered a RIC for any taxable year unless it meets an income test. Under this test, at least 90 percent of its gross income must be derived from certain sources. Under section 851(b)(2), qualifying income includes -

. . .dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to its business of investing in such stock, securities, or currencies . . . .

Section 2(a)(36) of the 1940 Act defines the term "security" as -

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 851(b) of the Code provides that, for purposes of section 851(b)(2), the term "dividends" includes amounts included in gross income under sections 951(a)(1)(A)(i) or 1293(a) for the taxable year to the extent that, under sections

959(a)(1) or 1293(c), there is a distribution out of the earnings and profits of the taxable year which are attributable to the amounts so included.

Section 957 of the Code defines a CFC as any foreign corporation in which more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote, or (2) the total value of the stock, is owned by United States shareholders on any day during the corporation's taxable year. A United States shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total voting power of a foreign corporation.

Section 951(a)(1) of the Code provides that if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during any taxable year, every person who is a United States shareholder of the corporation and who owns stock in it on the last day of the taxable year in which the corporation is a CFC shall include in gross income the sum of the shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952(a)(2) defines subpart F income to include foreign base company income determined under section 954. Under section 954(a)(1), foreign base company income includes foreign personal holding company income determined under section 954(c). Section 954(c)(1)(A) defines foreign personal holding company income to include dividends, interest, royalties, rents, and annuities.

Section 1297 of the Code defines the term "passive foreign investment company" ("PFIC"). Under section 1297(b)(1), the term "passive income" under section 1297(a)(1) generally means income that would be foreign personal holding company income under section 954(c). Section 1297(b)(2) provides exceptions to what is passive income.

Under section 1295 of the Code, a PFIC may be treated as a qualifying electing fund ("QEF") if it satisfies certain conditions.

Sub's investments may generate foreign personal holding company income under section 954(c), which is subpart F income. Fund would therefore include in income Sub's subpart F income for the taxable year in accordance with section 951.

## ANALYSIS AND CONCLUSION

Parent has represented that Sub will be a wholly-owned subsidiary of Parent. Parent is a United States person. Based upon Parent's representations, Sub will qualify as a CFC under these provisions.

Based on the facts as represented, we rule that subpart F income of Sub and QEF inclusions of Sub attributable to the Funds is income derived with respect to the

Funds' business of investing in the stock of Sub, and thus constitutes qualifying income under section 851(b)(2), without regard to whether the income has been distributed.

This ruling is directed only to the taxpayer who requested it, and is limited to the facts as represented by the taxpayer. Section 6110(k)(3) provides that this letter may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

Susan Thompson Baker  
Susan Thompson Baker  
Senior Technician Reviewer, Branch 2  
Office of Associate Chief Counsel  
Financial Institutions and Products